

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RANDELL SHARP)	
Claimant)	
VS.)	
)	Docket No. 245,229
BRAND SCAFFOLD)	
Respondent)	
AND)	
)	
RELIANCE NATIONAL INDEMNITY CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the May 22, 2000 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

This is a claim for a May 15, 1999 accident and alleged injuries to the neck, low back, and both shoulders. After conducting two preliminary hearings, Judge Barnes determined that claimant's contract of employment was made within the state of Kansas and, therefore, found that claimant was entitled to receive benefits under the Kansas Workers Compensation Act.

Respondent and its insurance carrier contend the Judge erred. They argue that the Kansas Workers Compensation Act does not apply as the accident occurred in Colorado and the contract of employment was made in the state of Colorado. Additionally, they argue that claimant has failed to prove that he injured his neck, back, and right shoulder in the accident.

Claimant did not file either a letter or brief with the Appeals Board for purposes of this appeal. Therefore, the Board does not have claimant's response to the issues raised in the brief of the respondent and its insurance carrier.

The only issues before the Appeals Board on this review are:

1. Was the employment contract created in Kansas?

2. If so, are claimant's neck, back, and shoulder complaints directly related to the May 15, 1999 accident?

FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds:

1. On May 15, 1999, claimant was injured in the state of Colorado while working for respondent. The accident occurred when claimant grabbed a falling board while he and coworkers were dismantling a scaffold.

2. Respondent hired claimant in October 1998 after claimant telephoned respondent's offices in Denver, Colorado. At the conclusion of that telephone conversation, claimant believed he had been hired to work for respondent. But the record does not disclose sufficient detail as to the actual telephone conversation to determine whether claimant accepted an offer of employment from respondent or whether respondent accepted an offer for services from claimant. Claimant testified, in part:

Q. (Mr. Seiwert) And tell me how you came to be hired by Phillips Scaffold [respondent].

A. (Claimant) It was a friend of mine worked for them. And he called me up and he said they need some scaffold builders. He gave me the number to call, Denver. And I called Denver and I talked to Joel over the phone. And he asked me how many years I had as a scaffold builder, I told him four years scaffold builder. And we talked a little farther and we talked about pay, \$12.00 an hour. And he hired me over the phone, told me to come to Denver.¹

...

Q. (Mr. Torline) And what did Joel tell you?

A. (Claimant) Well, we talked. And I asked him was he hiring scaffold builders and he said yes. And he asked me how many years experience I had, I told him four. And we talked about what the wages was and we discussed \$12.00 an hour.²

...

¹ Preliminary Hearing, August 10, 1999; p. 7.

² Preliminary Hearing, August 10, 1999; pp. 20, 21.

Q. (Mr. Seiwert) And when you got off the phone with Joel that first time and understood you needed to travel to Denver, in your mind did you or did you not have a job?

A. (Claimant) Yes, sir. When I got off the phone with him he said I would have a job when I got there.³

Sometime after that telephone conversation, claimant drove to Denver where he submitted an employment application, took a physical, and had a drug test. Respondent paid claimant's mileage for the trip.

CONCLUSIONS OF LAW

1. The preliminary hearing Order should be reversed.
2. When a worker is injured outside the state of Kansas, the Kansas Workers Compensation Act does not apply unless (a) the principal place of employment is within the state or (b) the contract of employment was made within the state and the contract does not provide otherwise. The Act reads, in part:

. . . That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides: . . .⁴

3. When an employment contract is created over the telephone, the contract is considered created where the party accepts the offer.⁵ In *Neumer*,⁶ the Kansas Supreme Court held:

A contract is considered "made" when and where the last act necessary for its formation is done. When that act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his acceptance.

³ Preliminary Hearing, August 10, 1999; pp. 30, 31.

⁴ K.S.A. 44-506.

⁵ *Neumer v. Yellow Freight System, Inc.*, 220 Kan. 607, 556 P.2d 202 (1976); *Hartigan v. Babcock & Wilcox Co.*, 191 Kan. 331, 380 P.2d 383 (1963); and *Pearson v. Electric Service Co.*, 166 Kan. 300, 201 P.2d 643 (1949).

⁶ *Neumer*, syl. 2.

4. As this juncture, the evidence fails to establish that the Kansas Workers Compensation Act applies to the May 1999 accident. First, the accident occurred in Colorado. Second, the evidence does not establish that claimant's principal place of employment was within the state of Kansas. Third, the present record fails to establish which party in their telephone conversation accepted the other's offer, which is critical in determining whether the employment contract is considered created in Kansas or Colorado. It cannot be assumed that respondent offered to hire claimant as opposed to claimant offered to work for respondent. And, unfortunately, the evidence presented to date provides insufficient detail from which to draw any reasonable conclusion concerning that issue.

5. The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.⁷ And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.⁸

6. Because claimant has failed to prove that the employment contract was created in the state of Kansas, or that the Kansas Workers Compensation Act otherwise applies, the request for benefits must be denied. This conclusion renders all other issues moot.

7. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.⁹

WHEREFORE, the Appeals Board reverses the May 22, 2000 preliminary hearing Order and denies claimant's request for benefits.

IT IS SO ORDERED.

Dated this ____ day of July 2000.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
 Terry J. Torline, Wichita, KS
 Nelsonna Potts Barnes, Administrative Law Judge

⁷ K.S.A. 1999 Supp. 44-501(a).

⁸ K.S.A. 1999 Supp. 44-508(g).

⁹ K.S.A. 1999 Supp. 44-534a(a)(2).

Philip S. Harness, Director